Memorandum - LCP4801 Assignment 2 2024 (semester 1)

Instructions

1. The text must be typed in Arial font, size 12 with single line spacing within the paragraph, and double line spacing after the paragraph.

2. All quotes that are two lines long (or less), must form part of the main text, be placed in quotation marks. Where a quotation is longer than two lines, it must be typed in a separate paragraph in in size 11 font and must be indented by 1 cm. No quotation marks are required when the quotations stand alone. Use quotations very sparingly. A maximum of 5% of the text may be quoted.

3. When answering the questions, remember you are expected to prove that you can use information, rather than merely repeat it. In brief, what is being tested is factual knowledge, understanding and the correct application thereof. You are expected to identify precisely what information applies, and then explain why you think so.

4. Also, because you have the guide and prescribed textbook available when answering questions, we do not give marks for direct quotations from the guide. You are therefore assessed on your level of understanding of the legal principles by looking at how well you convey the principles.

5. DO NOT CUT AND PASTE ANSWERS FROM THE STUDY GUIDE (OR ANY OTHER SOURCE). THE USE OF ARTIFICIAL INTELLIGENCE IS STRICTLY PROHIBITED.

6. YOU NEED TO FULLY REFERENCE YOUR SOURCES WHEN ANSWERING THE QUESTIONS. This includes reference to author(s), the title and page numbers (of the textbook, study guide and academic articles) and complete references to the relevant case law.

Question 1

"There is no hierarchy among the sources of customary international law listed in Article 38(1) of the ICJ Statute. It is, in fact, nothing but an exercise in futility to attempt to justify a ranking of some sort among these sources.' To what extent does this statement represent the true nature of the provisions contained in Article 38(1) of the ICJ Statute? **(10)**

Suggested answer

Article 38(1) of the Statute of the International Court of Justice lists the sources of international law individually and consecutively, under points (a) to (d) as follows:

> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states,
> b. international custom, as evidence of a general practice accepted as law,
> c. The general principles of law recognized by civilized nations,
> d. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[1]

[1] Hennie Strydom (ed) et al, *International Law* (2 ed Oxford University Press 2020) 73.

Although these sources have not been expressed in a single provision, pronouncing the fact that all sources are of equal force and value, the reality is that this does not indicate that any hierarchy exists with respect to such sources 'in all cases'.[2] To be sure, Abbas remarks that the structure of Article 38(1) is 'deceptive' by implying that the sources should be applied in the order in which they appear.[3] Compounding the apparent confusion is the phrase 'subsidiary means' included in the wording of Article 38(1)(d), which tends to convey that there are principal sources and subordinate sources.[4]

The *travaux préparatoires* are helpful in determining whether or not a hierarchy exists. Published evidence dating to 1920 reveals that the Permanent Court of International Justice Advisory Committee of Jurists made it explicit that the sources should not be considered 'in the undermentioned order' or 'rank in the order of appearance in Article 38(1)'.[5]

Nevertheless, in practice, as a result of the crystallization and codification of the principles of international law through treaties, it is arguable that treaties hold 'primary significance'.[6] An example of this is case of *Democratic Republic of the Congo v Rwanda*,[7] decided in 2006 where the Court upheld the Genocide Convention's definition of genocide as an absolute norm of international law, thereby overriding the customary international law understanding of genocide. Further substantiating this position is the rule that in the case of successive treaties, the treaty prior in time takes priority; a special treaty rule prevails over a general treaty rule known as the *lex specialis derogate legi generali*.[8] Statutory (but not judicial) confirmation of this point is found in Article 64 of the Statute of the ICJ which deals with the creation of a new, pre-eminent rule of international law. This provision emphasizes that an existing treaty, one that existed before the new peremptory standard emerged that is against the norm will be declared invalid, void, and it will be terminated.[9]

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2 Hennie Strydom (ed) et al, *International Law* (2 ed Oxford University Press 2020) 74.
3 Ademola Abass *International Law: Cases, Text, Materials* (Oxford University Press 2012) 59.
4 Ademola Abass *International Law: Cases, Text, Materials* (Oxford University Press 2012) 59. See also Erika De Wet and Jure Vidmar (eds) *Hierarchy in International Law: The place of Human Rights* (Oxford University Press 2012) 14.
5 Ademola Abass *International Law: Cases, Text, Materials* (Oxford University Press 2012) 59-60.
6 Hennie Strydom (ed) et al, *International Law* (2 ed Oxford University Press 2020) 74.
7 Also referred to as *Armed Activities on the Territory of the Congo* ICJ Reports 2006, 6.
8 Ademola Abass *International Law: Cases, Text, Materials* (Oxford University Press 2012) 60. Here, Abass cites to Thirlway who suggests that the lex specialis 'prevails over any inconsistent rules of customary international law' (Hugh Thirlway 'The source of international law' in Malcolm Evans (ed) *International Law* (Oxford University Press 2010) 114).
9 Hennie Strydom (ed) et al *International Law* (2 ed Oxford University Press 2020) 95.

Question 2

"The general principles of law recognized by civilized nations" means general principles of international law.' Critically examine this statement. **(15)**

Suggested answer – students may come to a different conclusion however they need to motivate

The notion of "general principles of law recognized by civilized nations" should not be interpreted in the pejorative or discriminatory sense.[10] A shift in approach has occurred from the anachronistic thinking of the period when the erstwhile community of states was deemed to consist of "civilized and less civilized nations".[11] For this reason, the Third World Approach to International Law (TWAIL) is premised on the aspiration to completely eradicate any distinction based on the "status" of member states (and their peoples) of the United Nations.[12] Instead, eminent jurists, such as Judge Lachs's view (albeit in his dissenting opinion) has brought some measure of certainty. In the *North Sea Continental Shelf* Lachs explains that the general principles of law should be sought in the actions of a great number of states – possibly the majority of states – and in any case, the combined majority of those states involved in a particular dispute. Courts have consciously omitted the phrase 'general principles of law recognized by civilized nations' in their judgments. Courts have preferred to apply general legal principles.[13] Accordingly, general principles of law recognized by civilized nations, simply means those principles of international law applied by the courts in the post-United Nations Charter era, on the unequivocal understanding that all members of the United Nations possess sovereign equality and all are entitled to voice their opinion on the substantive content of these general principles.[14] Bassiouni maintains that general principles of law have been developed by way of the application of the principle of equilibrium which has emerged from manifestations of international consensus expressed in the General Assembly and Security Council. In this regard, the United Nations Charter endorses the general principles of international law as embodying the principles of consent, reciprocity, equality of all states, the finality of awards and settlements, the legal validity of agreements, good faith, domestic

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10 M Cheif Bassiouni 'A functional approach to "General Principles of International law"' (1990) MJIL 11(3) 778.

11 Hennie Strydom (ed) et al *International Law* (2 ed Oxford University Press 2020) 112; Rudolf Schlesinger 'Research on the General Principles of Law by Civilized Nations' (1957) AJIL 51(4) 735.

12 See as a non-exhaustive list, Makau wa Mutua 'What is TWAIL?' in S Wiessner (ed) *General Theory of International Law* (2017); Makau wa Mutua 'Why Redraw the Map of Africa: A Moral and Legal Inquiry' (1995) 16(4) Michigan Journal of International Law 1122; Anthony Angie 'The Evolution of International Law: Colonial and Post-Colonial Realities' (2006) 27(5) Third World Quarterly 739; Sandya Pahuja *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press 2011); Ngũgĩ wa Thiong'o *Decolonizing the Mind* (James Curry 2011); Leigh Patel *No Study Without Struggle: Confronting Settler Colonialism in Higher Education* (Beacon Press 2021).

13 Hennie Strydom (ed) et al *International Law* (2 ed Oxford University Press 2020) 112. See also M Cherif Bassiouni 'A functional approach to "General Principles of International law"' (1990) MJIL 11(3) 775.

14 Hennie Strydom (ed) et al *International Law* (2 ed Oxford University Press 2020) 128.

jurisdiction, and the freedom of the seas for all states to promote a functional approach based on consideration of reasonableness and fairness.[15]

Giving content to the notion of 'general principles', the Court in the *Nuclear Weapons* case confirmed that good faith is one of the most fundamental principles governing the creation and performance of legal obligations.[16] Equating good faith to the sovereign equality of states has had the effect of enhancing and modernizing international law. One could even argue that it seeks to ensure the integrity of the 'cardinal concept of law', being the obligation on states to comply with their obligations.[17] This thinking is supported by the United Nations Charter itself, which proclaims in Article 2(2) that all members must fulfill the obligations they have taken on in line with the current Charter in good faith to ensure that all members receive the rights and advantages that come with its membership. Furthermore, the inclusion of Article 38(1)(c) in the ICJ Statute was in pursuit of preventing *non-liquet*;[18] a precarious situation in which a court is forced to declare that no judgment can be rendered in a case due to the absence of an applicable rule of law. Closely related to this is the corollary principle of decisions *ex aequo et bono* (according to the right and good) and based on equity. In terms of Article 38(2) of the Statute of the ICJ Statute, a matter may be decided *ex aequo et bono* if all parties to the dispute have agreed to be bound by this principle and have articulated their desire for adjudication of a matter based on symmetry of power.[19] Consequently, the Court is empowered to revise any settlement of a dispute that involves aspects of compromise and conciliation that would cause the parties to concede some of their goals or core beliefs.[20]

Question 3

Critically discuss, through an analysis of South African case law, whether there is an obligation on the South African government to offer diplomatic protection to its nationals abroad who have been injured by the actions of a foreign state. **(25)**

Suggested answer = maximum 25 marks

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15 M Cherif Bassiouni 'A functional approach to "General Principles of International law"' (1990) MJIL 11(3) 785.

16 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) ICJ Reports July 1996, 226. para 102 as discussed in Hennie Strydom (ed) et al *International Law* (2 ed Oxford University Press 2020) 133.

17 Hennie Strydom (ed) et al *International Law* (2 ed Oxford University Press 2020) 143.

18 Hennie Strydom (ed) et al *International Law* (2end OUP 2020) 112.

19 M Cherif Bassiouni 'A functional approach to "General Principles of International law"' (1990) MJIL 11(3) 785.

20 Hennie Strydom (ed) et al *International Law* (2 ed Oxford University Press 2020) 75.

A state has a right to protect its nationals abroad who have been injured by the actions of the foreign state √. The state may take up the case of its subject by resorting to diplomatic action, or international judicial proceedings √. The cornerstone of this right is that an injury to a national is considered to be an injury to the state √ - see the Panevyezys-Saldutiskis Railway Case. √ Therefore, under international law, the right of diplomatic protection vests in the State √. The state is not under any duty to exercise its right √. While the domestic laws of a state may impose such obligation, international law does not √.

In the ***Kaunda v President of the Republic of South Africa*** **2005 (4) SA (CC)** a number of South Africans had been arrested in Zimbabwe and Equatorial Guinea in connection with charges relating to mercenary activities and plotting a coup against the President of the Equatorial Guinea √. Those arrested in Zimbabwe feared that they would be extradited to Equatorial Guinea **(½)**. All the Applicants claimed that they would not receive a fair trial in Equatorial Guinea **(½)**. Furthermore, they contended that, if they were convicted in Equatorial Guinea, they would be sentenced to death **(½).** They claimed, therefore, that the South African government was under an obligation to offer them diplomatic protection **(½)**. The court dismissed the application (½). The majority decision recognised that international law did not oblige a state to provide diplomatic protection, but in terms of the South African Constitution, there was at least some obligation on the part of the government to provide protection to its nationals abroad √. The court began by asserting that a request to the South African government for diplomatic protection was unlikely to be refused if there had been a gross violation of international human rights norms, and the evidence to that effect was clear √. The Court noted that the executive has a broad discretion when conducting foreign affairs, the courts can review such decisions on the grounds of, for example, irrationality and bad faith √.

In *Van Zyl v Government of the RSA* 2008 (3) SA 294 (SCA) the applicants requested the South African government to extend diplomatic protection to them in their dispute with the government of the Kingdom of Lesotho (½). The dispute related to expropriation of the applicants' mining leases, mining rights and tributing agreements without compensation being paid to them (½). The contracts referred to were not internationalised. The expropriation had taken place in execution of the Lesotho Highlands Water Project (½). The latter was provided for in a treaty between the SA government and that of Lesotho (½). The Applicants claimed that they were entitled to diplomatic protection from the government of South Africa, but the government refused to provide such √. The application was dismissed because the Applicants could not prove that the government of Lesotho committed an international delict (½). The court pointed out that neither international law, nor the Constitution recognised the right to diplomatic protection √.

In ***Von Abo v Government of the RSA*** **2009 (2) SA 526 (T)** the applicant was a South African farmer in Zimbabwe √. Zimbabwe had violated his rights by destroying his property interests in many Zimbabwean farms as part of a governmental scheme of expropriation (½). Von Abo was not compensated and he had exhausted all local remedies (½). Von Abo requested the South African government to afford him diplomatic protection vis-à-vis Zimbabwe (½). The applicant claimed that he had a right to such protection in terms of the South African Constitution (½). Relying on the judgment in Kaunda, the court in Von Abo found that there need not be an actual refusal on the part of government to grant diplomatic protection before a court would intervene (½). The court relied on the judgment in Kaunda to conclude that the state had a duty to provide assistance to the applicant (½). The case went back to the High Court to confirm whether the government had complied with the Court order √. The court awarded Von Abo damages arising from the infringement of his rights in Zimbabwe √. In 2011, the government appealed to the Supreme Court of Appeal (SCA) and the SCA disagreed with the High Court's award of damages √.

These three judgments show that the issue of diplomatic protection is **yet** to be resolved by South African Courts. √